Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-998

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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CITY OF RICHMOND,

*Appellant,*

v.

J. A. CROSON COMPANY,

*Appellee.*

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**On Appeal from the United States Court of Appeals for the Fourth Circuit**

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## JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED DECEMBER 17, 1987
PROBABLE JURISDICTION NOTED FEBRUARY 22, 1988

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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No. 84-0021-R

J.A. CROSON COMPANY,
*Plaintiffs*

v.

CITY OF RICHMOND,
*Defendants*

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**DOCKET ENTRIES**

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 1984 | | |
| Jan. 12 | 1 | Petition for Removal, filed. apc |
| Jan. 12 | 2 | Notice of Filing of Petition for Removal, filed. apc |
| Jan. 18 | 3 | Pltf's Motion for Preliminary Injunction, filed. apc |
| Jan. 18 | 4 | Pltf's Memorandum in Support of Motion for Preliminary Injunction, filed. (exhibits attached & one transcript as exhibit) apc |
| Jan. 19 | | IN OPEN COURT: MERHIGE, J. HALASZ, OCR APPEARANCES: PARTIES BY COUNSEL. MATTER CAME ON FOR HEARING ON PLTF'S MOTION FOR A TRO. MOTION HEARD; DENIED. ORDER TO ENTER. CASE SET FOR TRIAL ON 2-20-84 AT 2 PM. (55 MINS.) JWH |
| Jan. 23 | 5 | ORDERED that Pltf's Motion for Preliminary Injunction is DENIED. ENT 1-23-84, RRMjr, and filed. Copies mailed. mkh |

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 1984 | | |
| Jan. 25 | 6 | Pltf's Notice to Take Deposition of Melvin Brown & production of documents, filed. Subpoena issued. apc |
| Jan. 27 | 7 | Deft's Motion to Dismiss, filed. apc |
| Jan. 27 | 8 | Deft's Memorandum of Law in Support of Motion to Dismiss, filed. apc |
| Feb. 3 | — | Records rec'd fr. Melvin Brown, Pres. of Continental Metal Hose purs. to subpoena *duces tecum* of 1/26/84. (in brown expandable) apc |
| Feb. 6 | — | Records rec'd fr. Melvin Brown 2/03/84 purs. to deposition subp. & subp. *duces tecum* picked up by Mr. Brown. apc |
| Feb. 8 | 9 | Pltf's Memorandum in Opposition to Motion to Dismiss, filed. apc |
| Feb. 10 | 10 | Deft's Motion for Partial Summary Judgment, filed. apc |
| Feb. 10 | 11 | Deft's Brief in Support of Motion for Partial Summary Judgment, with attached (located in brown expandable folder), filed. apc |
| Feb. 17 | 12 | Pltf's witness list, Filed. afw |
| Feb. 17 | 13 | Deft's Motion for Sum. Judg., filed jlm |
| Feb. 17 | 14 | Deft's Memo. of Law in Support of Motion for Sum. Judg., filed jlm |
| Feb. 17 | — | Telephone Deposition of Elsie C. Slaton taken 2-9-84, recd jlm |
| Feb. 17 | — | Deposition of Donald M. Sparrow taken 1-30-84 on behalf of deft, recd jlm |
| Feb. 17 | — | Deposition of Wallace Green taken 2-15-84, recd jlm |

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 1984 | | |
| Feb. 17 | — | Telephone Deposition of Curtis W. Johnson, recd jlm |
| Feb. 17 | — | Deposition of Eugene Bonn, recd jlm |
| Feb. 17 | 15 | Stipulated Exhibits of the Parties, filed (List, with exhibits in brown binder) jlm |
| Feb. 17 | 16 | Pltfs' Cross-Motion for Partial Sum. Judg., filed jlm |
| Feb. 17 | 17 | Pltfs' Memo. in Support of Cross-Motion for Sum. Judg., filed jlm |
| Feb. 17 | — | Depositions of Vernon Forest Williams, Jr., Harold R. Wall, Donald G. Clark, Chris W. Stevens, Jr. & Alfred E. Smith on 2-6-84, recd jlm |
| Feb. 20 | 18 | Pltf's Proposed Findings of Fact, filed jlm |
| Feb. 20 | | IN OPEN COURT: MERHIGE, J. HALASZ, OCR APPEARANCES: PARTIES BY COUNSEL. MATTER CAME ON FOR HEARING ON PLTF'S MOTION FOR A PRELIMINARY INJUNCTION. PLTF ADDUCED EVIDENCE IN SUPPORT OF THE MOTION. MATTER TAKEN UNDER ADVISEMENT. JWH |
| Feb. 23 | 18 | Pltf's Motion to Admit Stipulation of Evidence, filed. apc |
| Feb. 23 | 19 | Stipulation of Evidence, filed. apc |
| Feb. 23 | — | Stipulated Exhibits, rec'd. apc |
| Feb. 24 | 20 | Deft's Notice of hearing on motion to dismiss scheduled 3/12/84 at 8:30 a.m., filed. apc |
| Feb. 24 | 21 | Deft's Memorandum in Opposition to Pltf's Cross-Motion for Partial Summary Judgment, filed. apc |

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 1984 | | |
| Feb. 24 | 22 | Pltf's Reply to Deft's Motion for Summary Judgment, filed. apc |
| Feb. 24 | 23 | Pltf's Motion for Summary Judgment, filed. apc |
| Feb. 24 | 24 | Pltf's Memorandum in Support of Motion for Summary Judgment, filed. apc |
| Feb. 27 | 25 | ORDER, that Stipulation of Evidence is admitted into evidence, ENTERED by RRMjr on 2/27/84 & filed. Copies mailed to counsel. apc |
| Mar. 12 | | IN OPEN COURT: MERHIGE, J. HALASZ, OCR APPEARANCES: PARTIES BY COUNSEL. MATTER CAME ON FOR ARGUMENTS ON MERITS AND HEARINGS ON MOTIONS. CITY RICHMOND'S MOTION TO DISMISS DENIED. ARGUMENTS ON MERITS AND CROSS MOTIONS SUMMARY JUDGMENT HEARD. CASE TAKEN UNDER ADVISEMENT BY THE COURT. (1 HR. 29 MINS.) JWH |
| Dec. 3 | 26 | ORDER that judgment be and is hereby entered in favor of the defendant City of Richmond and it stands dismissed with its taxable costs, motions of the City of Richmond for counsel fees be and are DENIED, ent. 12-3-84, RRMjr, filed. Copies mailed. jlm |
| Dec. 3 | 27 | Court's Memorandum, filed. jlm |
| Dec. 27 | 28 | Pltf's Notice of Appeal, filed. Filing Fee Pd. TPO mailed. apr |

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Docket No. 85-1002 (L)

J. A. CROSON COMPANY,
*Appellant*,

v.

CITY OF RICHMOND,
*Appellee*.

ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
*Amicus Curiae*.

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**DOCKET ENTRIES**

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 01/02/85 | Case Docketed. Awaiting ROA. (db) |
| 01/08/85 | Transcript Purchase Order rec'd by G. Halasz 01/08/85, filed. (db) |
| 01/16/85 | ORDER consolidating 85-1002(L) and 85-1041, filed. (db) |
| 01/16/85 | DISCLOSURE STMNT, E, N, filed. (db) |
| 01/17/85 | DISCLOSURE STMNT, A (85-1002), N, filed. (db) |
| 01/17/85 | DISCLOSURE STMNT, E (85-1041), N, filed. (db) |
| 01/24/85 | DISCLOSURE STMNT, A (85-1041), N, filed. (db) |
| 02/06/85 | BRIEFING ORDER, filed. A due 03/18/85. Oral argument tentatively set for Summer 1985 session of Court. (db) |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 02/15/85 | DESIGNATION, A,—parts to be included in the appendix, filed. (db) |
| 02/21/85 | DESIGNATION, E,—parts to be included in appendix, filed. (db) |
| 3/18/85 | MOTION of Associated General Contractors of America (C-69) for leave to file as amicus curiae, filed. jd |
| 03/21/85 | DESIGNATION, E,—parts to be included in appendix, filed 2/15/85. (db) |
| 3/26/85 | REPLY (C-69) of A J. A. Croson Company to motion to file as amicus curiae, filed (DHB:nac) |
| 4/2/85 | RESPONSE of City of Richmond to motion C-69, filed. jd |
| 4/3/85 | ORDER granting motion C-69. (BMM:jd) Copy to counsel. |
| 04/18/85 | DISCLOSURE STMNT, (amicus curiae), N, filed. (db) |
| 6/6/85 | MOTION of E (F-48) to dismiss A Corson's appeal, filed. jd |
| 6/10/85 | ORDER denying motion F-48. (BMM:jd) (Copy to counsel. |
| 07-03-85 | MOTION (G-24) and memorandum in support of motion to file supplemental joint appendix, filed (BMM:cw) |
| 7/8/85 | MOTION G-24, memorandum in support of motion and conditionally submitted jt apx transmitted to KKH/JMS/JHW. (BMM:jd) |
| 7/16/85 | ORDER granting motion G-24 to file supp. apx. (BMM:jd) Copy to counsel. |
| 12/13/85 | MOTION (M-103) for stay of mandate of A, filed (DB:nac) |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 12/17/85 | ORDER denying A's motion for stay of mandate, filed (DB:nac) Copy to Ryland; Barley-Sarahan; Kennedy |
| 07/09/86 | U.S. Supreme Court order dated 7/7/86 granting cert., vacating and remanding to Fourth Circuit for further consideration in light of decision in Wygant vs. Jackson Board of Education, 476 U.S.—(1986); filed. lgs |
| 7/10/86 | TRANSMITTED order of Supreme Court to panel KKH, JMS, & JHW, BMM:cb |
| 08/18/86 | Judgment of U.S. Supreme Court dated 7/7/86; filed. lgs |
| 08/19/86 | TRANSMITTED judgment of U.S. Supreme Court of JMS, KKH, JHW, BMM:cb |
| 11/13/86 | SUPPLEMENTAL AUTHORITY submitted by A, filed. BMM:cb |
| | TRANSMITTED to KKH, JMS, JHW |
| 3/5/87 | MOTION (F-3) of A for a briefing order, filed. SAR:gac Transmitted to JMS/KKH/JHW on 3/5/87). |
| 7/21/87 | Appellant's bill of costs filed. mb |
| 7/23/87 | PETITION for Rehearing w/Suggestion for Rehearing In Banc filed by E, BMM:cb |
| 7/23/87 | MOTION of National Lawyers Committee for Civil Rights Under Law for leave to file a brief amicus curiae in support of E's pet. for rehearing and sug. for rehearing in banc and conditionally submitted brief filed, BMM:cb |
| 7/24/87 | Transmitted Petition for rehearing with suggestion for rehearing in banc and motion of National Lawyers Committee and conditionally submitted brief to panel, transmitted petition for rehearing & suggestion for rehearing in banc to all active circuit Judges, BMM:cb |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 8/12/87 | A's answer to petition for rehearing w/suggestion for rehearing in banc, filed. BMM:cb |
| 8/14/87 | TRANSMITTED A's answer to all active circuit judges. BMM:cb |
| 9/18/87 | ORDER denying pet. for rehearing & sugg. for rehearing in banc, and FURTHER ORDERED the the motion of the National Lawyers Committee for Civil Rights Under Law for leave to file brf as amicus curiae is granted, filed. SAR:gac Copies to Kennedy; Sarahan-Carneal; Ryland. |
| 0/24/87 | MOTION of City of Richmond for stay of mandate, filed. SAR:gac |
| 9/25/87 | Transmitted motion of City of Richmond for stay of mandate to JHW/JMS/KKH w/copy to all active cir. judges on 9/25/87. |
| 10-01-87 | ORDER staying the mandate pending timely application of the E to the Supreme Court for a writ of certiorari, filed (SAR:cw) Copies to counsel. |
| 10-01-87 | ORDER filed *correcting* this Court's order filed 10-01-87, filed (SAR:cw) Copies to counsel. |
| 11/18/87 | NOTICE OF APPEAL TO SUPREME COURT, filed. Copy transmitted to Clerk, Supreme Court. (db) |

RICHMOND CITY COUNCIL

IN RE: ORDINANCE NUMBER 83-69

# HEARING ON ADOPTION OF MINORITY BUSINESS UTILIZATION PLAN

April 11, 1983

Richmond, Virginia

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[2] Appearances:

ROY A. WEST, Mayor

CAROLYN C. WAKE, Councilperson

HENRY L. MARSH, III, Councilperson

WALTER T. KENNEY, Councilperson

WILLIAM J. LEIDINGER, Councilperson

DREW GILLESPIE, Councilperson

G. S. KEMP, JR., Councilperson

HENRY W. RICHARDSON, Councilperson

CLAUDETTE BLACK MCDANIEL, Councilperson

WILLIAM H. HEFTY, City Attorney

MANUEL DEESE, City Manager

(The following transcript was produced from stenographic notes taken of the electronically-recorded procedings.)

MAYOR WEST: Call Item 21.

UNIDENTIFIED: Item 21, (inaudible) 369, amend Article 1, General Provisions Act, Part B, Definitions, Chapter 24.1 Procurement, Ordinance 82-294-270, adopted December 20, '82 of the Richmond City Code of '75, as amended, to add definitions of minority business contract to minority group members; to add in said Chapter a new article number, [3] Article 8A, Title Minority Business Utilization Plan.

MAYOR WEST: Mr. Richardson.

MR. RICHARDSON: Yes. This ordinance is—can be considered teeth to a philosophy that I think most Members of Council already adhere to. It is an ordinance that will require contracts let by the City of Richmond at least 30 percent of which be secured by minority vendors. We have not reached a successful or an admirable goal in terms of minority participation, and this paper will make it mandatory that the purchasing department and the administration conscientiously

take a greater effort in attempting to distribute (inaudible) of a 50 percent minority community, to have those dollars recycled back to minority businesses, in the interest of the entire community.

This is not a social paper. This is not a humanitarian paper. This is a paper based on good sound business practices that will help and assist the growth, the development, and the improvement of attitudes of all Richmonders, and I would wholeheartedly encourage all Members of the Council to support the adoption of this paper.

MR. DEESE: Mr. Mayor?

MR. RICHARDSON: This is 30 percent requirement, and there are a number of clauses in here that address the specifics, the regulations, and how it is to be carried out.

MR. DEESE: Mr. Mayor?

[4] MAYOR WEST: Mr. Deese.

MR. DEESE: Mr. Mayor, Members of the City Council, the administration conceptually concurs in the paper. However, I would ask if Mr. Richardson would be amenable to any adjustment that would have a dollar amount. I would specifically request a dollar amount coinciding with the dollar amount that we have in the current papers, bids over a certain amount, which, I think, is $10,000. Because, it could cause us somewhat of a problem, anything less than that, and I'd say over $10,000.

And the other request I would make, Mr. Richardson, we do know that in this paper, there is sufficient requirements for the administration to waive and provide, as long as an effort has been made, and that is similar to the CDBG project, and we're familiar with the project.

MR. RICHARDSON: Could you explain, again, why you would need that exception, because there is a clause written in to waive any contract where the minority vendor cannot be located, and the purchasing agent has been given the discretionary decision-making ability to determine those instances.

MR. DEESE: The only reason I was raising the dollar amount, for the ease of the administration. It would be better for us if we have a dollar amount, as opposed to all construction projects. I think very few of them would be below [5] the number that we're talking about, but I would think that it would help us in the ease of the administration and the paper if we had a dollar amount.

MR. RICHARDSON: Would it also—

MR. DEESE: Would the dollar amount—what, $10,000 as we have now in the current law.

MR. MARSH: Mr. Mayor?

MAYOR WEST: Mr. Marsh.

MR. MARSH: May I suggest that we could accomplish that when the regulations and guidelines are drawn up. It doesn't have to be spelled out in the paper. At the time the guidelines are drawn up.

MR. DEESE: As long as Members don't have to amend the paper.

MR. MARSH: That could just be provided in the guidelines.

MR. DEESE: Conceptually, we concur with the paper.

MR. MARSH: One other request that I have. We have the CDBG procedure and guidelines. I'm assuming they will be followed?

MR. DEESE: Yes. We have the same guidelines and we don't see any major problem with this.

MAYOR WEST: Mr. Richardson, is there any mandate in this paper that a contractor who would contract with [6] the City would have to go out and get a subcontractor, but if, on the other hand, if that were needed, then he would have to—are you saying now that every contractor has to subcontract at least 30 percent of the work out?

MR. DEESE: He must make a bona fide, good effort to accommodate the requirement of the law. There are provisions that we use in CDBG. If they're not suc-

cessful, then it ultimately comes to me. And I make the determination whether or not there's been a good faith effort.

MAYOR WEST: My question is, suppose this is a turnkey contractor, who can do the job from A to Z; is he still forced out onto the market?

MR. RICHARDSON: No, he's not. There's some emergency provisions in there that—

MAYOR WEST: That's what I'm asking. If he can do everything from A to Z, does he still have to subcontract any of that work?

MR. RICHARDSON: No, he does not have to. But, this is an across the board 30 percent, that wherein some cases, we may not meet any more than one, two, three or four percent. Hopefully, we would compensate by, in some areas, increasing the minority participation and on balance, at the end of the year, we would have acquired a 30 percent utilization.

MAYOR WEST: Once again, the question is, where [7] there is subcontracting required, we have to do that to 30 percent, is this what you are saying?

MR. RICHARDSON: Yes.

MAYOR WEST: One other question. Why was there an expiration date of 1988 on this thing? I thought this would be something that we were going to perpetuity with.

MR. MARSH: That was on advice of counsel. I think there are advantages—

MR. HEFTY: The reason for that and the suggestion that a date be put in, was that the federal cases that approved this sort of set-up have said that it's remedial legislation, and the purpose is to remedy past discrimination. And hopefully, in some period of time, this program will cause that to happen. Five years was deemed to be a period of time with which that would happen in all likelihood. It can be judged at that time and either continued—it may expire before that. It's an ordinance that can be amended by Council at any time. That was deemed to be a fair date to evaluate the

effects of the program, rather than leave it open-ended.

MR. LEIDINGER: Mr. Hefty—

MAYOR WEST: Mr. Leidinger.

MR. LEIDINGER: Mr. Hefty, if I may, you've indicated a viewpoint taken by the Courts in cases where legislation like this has been approved. And, on page 10, line 16—if that is line 16—we say this article is [8] remedial. You having said that as legal advice, and that language being in the ordinance, are we acknowledging it's remedial for that purpose, and thus, exposing ourselves to liability?

MR. HEFTY: No, I don't feel that we're exposing ourselves to liability, but the Supreme Court, when it approved the ten percent minority set-aside, specifically said that the justification was that it was remedial. We've reviewed the statistics of the construction contracts, and it certainly justifies that. We have tried to tailor this ordinance as closely to the federal ordinance, which was—or federal statute, which was upheld by the Supreme Court, as possible. And, yes, it is remedial. I don't think that's exposing us to any liability for prior acts.

MR. LEIDINGER: Question. Doesn't the word remedial mean to make special efforts at the moment and in the near future to make up for prior deficiencies?

MR. HEFTY: Yes. In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're saying is there are statistics about the number of minorities that were awarded contracts in the past which would justify the remedial aspects of the legislation. We're not saying there was intentional discrimination in any particular case. Surprisingly, or maybe not so surprisingly, when the Supreme Court dealt with this issue, they allowed [9] evidence of general discrimination—at least discriminatory effect in the entire industry—construction industry. And they allowed more use of broader statistics than they do in a lot of cases. I'm not saying that we have discriminated in any individual case in the past.

MR. LEIDINGER: In civil rights legislation, is not statistical evidence prima facie evidence?

MR. HEFTY: It is evidence. I mean, whatever the statistics are, they are. We are not changing the statistics. If you look at what the City has done in procurement over the last few years, the statistics are the statistics, and they cannot be changed.

MR. LEIDINGER: Has the U.S. Supreme Court or any federal Court or state Court which has jurisdiction, if you will, over the City of Richmond, addressed to set aside beyond ten percent?

MR. HEFTY: No, not that I can find.

MR. LEIDINGER: Approved or addressed?

MR. HEFTY: I could not find a case in which it was addressed.

MR. LEIDINGER: Thank you.

MR. HEFTY: There was a recent Supreme Court case which was decided in last month, involving Boston, where Boston had a 50 percent set-aside for construction contracts requiring Boston contractors, City residents, to receive 50 [10] percent of the business. That was upheld at least on commerce clause grounds, possibly not on equal protection grounds. But, to answer your question directly, I could not find any case above ten percent.

MR. RICHARDSON: Mr. Mayor?

MAYOR WEST: Mr. Kemp and then Mr. Richardson.

MR. KEMP: Mr. Deese, what is our present experience?

MR. DEESE: Right now, I think we are probably still under ten percent. I don't have the exact statistics, but it's still under about ten percent. We do better on CDBG than we've done on the other projects.

MR. KEMP: Is it near ten percent, or—

MR. DEESE: The CDBG?

MR. KEMP: Overall.

MR. DEESE: I think it was somewhere between seven and eight on the overall—on general City contracts. And then CDBG, I think we pushed closer, in the 20's, somewhere between 17 and 22, I believe.

MR. RICHARDSON: Mr. Mayor?

MAYOR WEST: Mr. Richardson.

MR. RICHARDSON: Before we further any Council debate, could we indulge in the public hearing and then get back to—

MAYOR WEST: I wanted to make sure all questions [11] were answered, and then we can discuss later. Anyone to speak in favor of this paper, come forward, please.

MR. RICHARDSON: And Ms. Cooper, we want to apologize for keeping you here all night, watching us over the community development block grant funds.

MAYOR WEST: She's quite conversive with the process of government.

MS. COOPER: Mr. Mayor, Council, my name is Esther Cooper. I head a small minority corporation here in Richmond called Esther Cooper and Associates. We are a temporary employment placement people. I am here also to represent the Maymont Civic League. And we are in support of this ordinance of the 30 percent set-aside.

We are aware of the fact, as minorities—and I am a double minority—that the exclusionary process is often very subtle, and we cannot put our fingers on it. However, from time to time, as we market daily on the sidewalks of Richmond, we are exposed to not doors being slammed in our faces, but a kind of closed atmosphere to entertaining new companies and new ideas and new vendors here in the Richmond area.

For example, last year we had the occasion to visit one company five times before we were even allowed to do business with them. On our fifth occasion going there, a vice president said to us, well, the National Football League did [12] not settle their dispute in one meeting, so you must learn to negotiate four, five, even a dozen times. We're not marketing on an inferior product. We are marketing a standard product that is very similar to our competitors'.

I'm here speaking for contractors. True, I am not a contractor. I do not hire construction people. But, I would not let this opportunity pass without saying that if you can give us access to the enterprise system, we want it. We're not asking to come in as second-class or second-rate service folk. We're asking to come in as first-rate service folk, but to allow us access. Thirty percent is not one hundred percent. There is still seventy percent left over.

We, the Maymont Civic Association and myself as a citizen of Richmond City, living here and with a business in the City of Richmond, support this ordinance. We are in support of Mr. Chuck Richardson and the 30 percent for contractors. Even though we will not reap the benefits of it immediately, we cannot let the opportunity pass. We support Councilman Richardson and the ordinance. Thank you very much.

MAYOR WEST: Thank you. Anyone else to speak in favor of this paper? Anyone to speak in opposition?

MR. RAY: My name is Freddie Ray, and I'm the president of the task force for historic preservation in minority communities. I did not know that this paper was going to be presented, and it's a bit ahead of our newsletter, [13] which will be published by the end of this month, where we speak specifically about economic development and specifically about the development of minority businesses.

I would like to refer this Council to actions that have been taken in Oakland, California; Cleveland, Ohio; and Toledo. In Oakland, California, with a population—minority population of much less than 50 percent or 51 percent as we have in Richmond, Oakland has a 22 percent requirement of minority participation. This proposal, as I've heard it tonight, is rather limited, in that Oakland speaks not only of minority participation in contracting, but also talks about ownership and participation in the ownership of developments which are possibly funded by the City of Oakland.

The results have been tremendous. In one development, that is the development of a Hyatt hotel in Oakland, eight percent of the ownership of that hotel was, in fact, given to minority organizations. The result has been over 22 million dollars of investment and development within Oakland minority communities.

I can see no reason why this ordinance, as suggested by Mr. Richardson, should not be passed. I will suggest that we look at other ways of building and supporting economic development for minorities. Again, if I had known that this was being presented, I would have presented additional data about additional cities that do, in fact, include such an [14] ordinance. I think this is a step in the right direction; a little slow, but we're beginning to move, grow and develop as a city. Thank you.

MAYOR WEST: Do we have anyone else to speak in favor of this paper? Anyone to speak in opposition to the paper?

MR. WATTS: Good evening. Mr. Mayor, Members of Council, my name is Stephen Watts. I am an attorney with the law firm of McGuire, Woods and Battle here in Richmond, and I'm appearing tonight on behalf of my client, Associated General Contractors of Virginia, or AGC, in opposition to proposed ordinance number 83-69.

AGC is a Virginia non-profit organization, composed of some 600 general contractors, subcontractors, material and service suppliers, located throughout Virginia. Over 130 of AGC's members are located in the Richmond area. I've also been asked to voice the support of the Builders Exchange of Richmond for the remarks that I'm going to provide tonight, and specifically, the presence here tonight of Mr. George Albright, who is executive secretary of that organization, and Mr. Tyree Chappell, who is the president.

The Richmond Builders Exchange is composed of approximately 675 general contractors, subcontractors, and material and service suppliers. They're all located in the Richmond area. AGC's purpose is to promote the common

interest [15] of the industrial and commercial contracting industry in Virginia. In addition to their work in the private sector, AGC's members are extensively engaged in providing high quality construction services to public bodies at the lowest reasonable cost, including services to the City of Richmond.

One of AGC's principal aims is the establishment of fair and nondiscriminatory competitive bidding practices for public construction projects. Although proposed ordinance number 83-69 only came to AGC's attention within the last several days, they've asked me to explain to you their legitimate reasons for opposing passage of the ordinance and for urging that it be defeated.

Simply stated, AGC believes the ordinance represents bad policy and may be unlawful. AGC is opposed to any classification or preference based on race in the awarding of public construction contracts. AGC and its national affiliate, the Associated General Contractors of America, are on record in many forums as opposing racial discrimination as a matter of public policy. It is an axiom, however, of simple supply and demand economics that institutionalized restriction of access to the bidding process on public construction projects will result in higher construction costs to the public body and to its taxpayers. The effect of this ordinance will be to exclude nonminority contractors and subcontractors from a significant portion of the total dollar [16] value of Richmond's construction projects.

Based on experience, we believe the passage of this ordinance will necessarily result in higher bids, because the unrestricted forces of competition will not be available to keep bid prices down. In addition, the ordinance will have the effect of creating an unfair competitive advantage for nonminority contractors by excluding them from bidding on a substantial portion of public contracts. As I said, AGC strongly believes that unrestricted competitive bidding should be used on public contracts to insure free access to the bidding process for all potential bidders.

This is not a Court and I'm not here to make a legal argument to you, but I do want to express my concern that in addition to the unfortunate policy that would be established by this ordinance, it may well be unlawful under Virginia law. Our Supreme Court has said in a number of cases, and I quote, "that a municipal corporation possesses and can exercise only those powers granted in express words by statute or charter, those necessarily or fairly implied or incidental to the powers expressly granted, and those essential to the declared object and purpose of the municipal corporation. Not those that are simply convenient, but those that are indispensable."

Moreover, if an asserted power has not been expressly granted, or even if it's doubtful, the doubt must be [17] resolved against the exercise of the power. This doctrine is commonly known as the Dillon rule. In an opinion dated February 23, 1979, concerning the proposed human rights code for the City of Richmond, the Richmond City Attorney stated, and he cited the Dillon rule, "in the absence of a countervailing State policy, such as that of the Virginia Fair Employment Practices Act—excuse me, Contracting Act, a political subdivision can enact no requirement impairing competition in the letting of its contracts."

The sense of this opinion was recently confirmed in an October, 1982, opinion of the Attorney General of Virginia, regarding certain amendments to the Human Rights ordinance of the County of Fairfax. I can have copies of these documents available, if you wish. The Virginia Fair Employment Contracting Act not only fails to provide any such countervailing public policy, but specifically states in Section 2.1-376.1, and I quote, "in the awarding of contracts, no contracting agencies shall discriminate because of race, religion, color, sex or national origin." In Section 2.1-378 of the State Code, it is specifically provided that nothing in that portion of the Code shall be deemed to empower any agency to require any contractor to grant preferential treatment to or discriminate against any individual or any group because

of race, color, religion, sex or national origin, or account of any imbalance between the racial makeup of the contractor's [18] employees, compared with the number or percentage of such race in any community or in the State.

Moreover, the Virginia Public Procurement Act, which is found in Chapter 7 of Title 11 of the Virginia Code specifically precludes public bodies in the Commonwealth from excluding qualified vendors from access to public business, and provides that competition in procurement is to be sought to the maximum extent feasible. So, the proposed ordinance, at least in my view, appears to be in conflict with established State law, and I'm not aware that the City of Richmond has obtained specific approval from the General Assembly for such an ordinance.

Moreover, it appears to be in conflict with the City's existing procurement ordinance, contained in Chapter 24.1 of the City Code. In Article 8 of that chapter, discrimination in the award of contracts is specifically prohibited. "In the solicitation or awarding of contracts, the City shall not discriminate because of race, religion, color, sex or national origin of the bidder or offeror."

MAYOR WEST: Sir, could you summarize in a minute?

MR. WATTS: Yes, I am concluding right now.

MAYOR WEST: All right.

MR. WATTS: I am also aware of at least two recent instances in which the Alabama Supreme Court and a [19] federal Court in Ohio had struck down similar commercial set-aside provisions as being unconstitutional reverse discrimination. It's my understanding that in those cases, the ordinances offered were not able to withstand the constitutional test of strict scrutiny, which is applicable to any governmentally established classification or preference based on race.

For these reasons, AGC must oppose the proposed ordinance, and respectfully urges that it be defeated. Thank you very much for providing me an opportunity

to appear before you tonight. I'll be happy to attempt to answer any questions you might have.

MR. GILLESPIE: Mr. Mayor?

MAYOR WEST: Mr. Gillespie.

MR. GILLESPIE: While Mr. Watts is here,—

MS. WAKE: We need the rule suspension.

MR. DUFFEY: 11 o'clock. Mr. Gillespie?

MR. GILLESPIE: Aye.

MR. DUFFEY: Mr. Kemp?

MR. KEMP: Aye.

MR. DUFFEY: Mr. Kenney?

MR. KENNEY: Aye.

MR. DUFFEY: Mr. Leidinger?

MR. LEIDINGER: Aye.

MR. DUFFEY: Ms. McDaniel?

[20] MS. McDANIEL: Aye.

MR. DUFFEY: Mr. Marsh?

MR. MARSH: Aye.

MR. DUFFEY: Mr. Richardson?

MR. RICHARDSON: Aye.

MR. DUFFEY: Ms. Wake?

MS. WAKE: Aye.

MR. DUFFEY: Mr. Mayor?

MAYOR WEST: Aye.

MR. DUFFEY: The ayes have it.

MR. GILLESPIE: Mr. Mayor?

MAYOR WEST: Mr. Gillespie.

MR. GILLESPIE: This is—we'll all try together to come to oneness of this community. This is very much in keeping with that. But on the other hand, I sure am getting tired of spending all our City's time and money in Court, and I think you can see where this might be headed. I know this is not a Court of law, and I don't want us to get into a legal argument. The legality of this thing is something that I have been wrestling with myself, trying to decide in my own mind whether or not we're going to end up spending more of our money in Court. And I appreciate it if Mr. Hefty would maybe address some of Mr. Watts' legal concerns.

MR. HEFTY: Mr. Gillespie, regarding the State law issues, whether this is legal under Virginia law, Mr. Watts [21] did not cite a Supreme Court case from the Virginia Supreme Court, because there isn't one that's addressed it. And the problem that we have in many areas of local government law is that there's different Supreme Court cases on the subject, and we have a hard time deciding exactly what the law is.

The General Assembly has had these issues before them. They have not resolved them by passing legislation that might resolve the issue clearly on its face. The Public Procurement Act, which is the act that allows us to—in effect, requires us to follow its procedures, has two provisions which I think are relevant. 11-44, which we have adopted in our Public Procurement Act, says that discrimination shall not be allowed on the basis of race. Section 11-48 says that all public bodies may establish programs consistent with all provisions of this chapter to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions. Now, what "facilitates the participation of businesses owned by women and minorities in procurement transactions" means exactly has not been determined. I don't think that the anti-discrimination provision applies to this ordinance, due to the fact that it's remedial legislation. I don't view what we're doing as being discrimination. The Supreme Court when it had the follow up case before it in 1980, when it adopted the ten percent minority set-aside, dealt with the same issues, that higher [22] bids would be required to nonminorities who did not engage in any intentional discrimination on their own, would be subject to this and might lose bids.

All of those issues were addressed, and the U.S. Supreme Court didn't have any problem with them. Now, Mr. Leidinger's point is well-taken; I don't know of any case where 30 percent has been addressed at all. And I could not guarantee that this would win in Court. But, as far as being able to defend it, I feel very comfortable

with defending it under both Virginia law and federal law. Anything these days are subject to—

UNIDENTIFIED: Mr. Mayor?

MR. GILLESPIE: I haven't yielded the floor yet. We felt comfortable—I wasn't here, but apparently this Body felt comfortable—here we are, we find ourselves establishing law for the whole country. I just hate for us to put ourselves in that position, again. I mean, we're going to run out of money before long. I don't know—believe me, I am not trying to kill that thing, Mr. Richardson.

UNIDENTIFIED: I can see that.

MR. GILLESPIE: I haven't yielded. Would it hurt to have a two-week or 30-day delay, so that we could have an executive session and discuss this thing, the legal aspects of it. Maybe even with outside counsel. And when I say that, I'm not doubting Mr. Hefty's judgment or integrity, but there [23] are people who are experts in this field, I assume, and, you know, I just think we might be in the area where we might want to have a little more advice. Have an executive session to discuss this legal matter and see where we are.

MR. MARSH: Mr. Mayor?

MAYOR WEST: Mr. Marsh, ask for the floor.

MR. MARSH: I would oppose Mr. Gillespie's suggestion of continuance, and I think that Mr. Hefty's legal analysis was correct. We have extremely competent legal counsel representing the City, and I think that it's not quite fair to suggest that we don't. And I would oppose any continuance. I think that based on discussion and a study of the appropriate cases, the Richmond ordinance that is proposed is clearly constitutional. It is within the confines of the cases of the Supreme Court of the United States, and I have no doubt whatsoever that it's legal, and I would urge Council not to postpone this matter. I might suggest that the only thing that would result from the kind of procedure that Mr. Gillespie recommended would be delay and perhaps further legal expo-

sure because of the differences that might exist on this Council on this matter.

MR. GILLESPIE: Was it a 30-day delay, so that—

(Inaudible discussion.)

[24] MR. MARSH: The paper has already been delayed some—

MR. GILLESPIE: Yes, and I understand why it was postponed when it was pulled one time before because of legal concerns. Now, I have not been privy to the legal discussions about this. All I'm saying is I don't believe that a 30-day delay so that I, and maybe anybody else who worried about it, can satisfy themselves with the legal aspects of this thing. As it stands now, you put me in a position to have to vote against something that I'm in favor of, because I'm not sure what kind of legal grounds you stand on. I don't think a 30-day delay is going to hurt your program at all.

MR. MARSH: I would oppose—as co-sponsor, I would oppose any delay.

MAYOR WEST: Mr. Richardson.

MR. RICHARDSON: This would constitute the third —Mr. Gillespie, while I certainly would want to believe any honorable intent you might have, the results may be to further inflame any differences that are out there lingering, give them an opportunity to come to a head, give them an opportunity to show those spaces of further dividing this City. You and I, even with all the books of the Supreme Court, may ultimately differ on this issue. So, we're not going to resolve it, I don't think, regardless of how much time we go over it. We have had a number of sessions with Mr. Hefty, [25] going over—as I said, Mr. Gillespie, this matter is being deferred, or would be deferred three times, and within that time period, any decent level of interest would have prompted your investigation and you could have had the same discussions with Mr. Hefty as the co-patron of this paper, and myself as a patron.

Mr. Hefty—and I'm not going to question his expertise. I think he is as qualified as many other attorneys

that might be able to advise us, and I'm going to support this paper and urge that it not be deferred, on the weight of his legal advice. And he has advised us, based on pulling a number of cases and comparing them, that this is legal. And that remedial action in this case, in this instance, does not constitute reverse discrimination. And I think the statistics would embarrassingly reflect the need for such a paper.

MR. MARSH: Mr. Mayor?

MAYOR WEST: Mr. Marsh.

MR. MARSH: I have some questions of the gentleman, if we can let him go after we finish. Would you—you indicated that one of the organizations you represented, Associated General Contractors, had 600 general and subcontractors in Virginia?

MR. WATTS: That's correct.

MR. MARSH: What number of that 600 would be black?

[26] MR. WATTS: At the moment, I think the answer to that question is none. There have been some in the past. There are none now.

MR. MARSH: Now, the other organization you represent, the Builders Exchange of Richmond, 675 general and subcontractors in the Richmond area. What of that number would be black?

MR. WATTS: Maybe I can clarify that. First of all, I don't represent them. I was simply asked to tack them on in my remarks.

MR. MARSH: Well, the same question pertains. What number would be black?

MR. WATTS: I don't know the answer to that. I am advised there are black members of the Builders Exchange. I don't know how many.

MR. MARSH: But, would you say very, very few?

MR. WATTS: I have no idea.

MR. MARSH: All right. Now, of the 130 of the Associated General Contractors in the Richmond area, how many of those are black?

MR. WATTS: Well, as I said, I don't think there are any black members of the organization now, so that would include those in the Richmond area.

MR. MARSH: Do you—have you contacted any minority organizations or minority contractors?

[27] MR. WATTS: No, sir. I represent the Associated General Contractors.

MR. MARSH: Okay. No further questions.

MAYOR WEST: Mr. Kenney.

MR. KENNEY: Mr. Watts, you indicated in your presentation in opposition to this particular paper, that one of the reasons why you on behalf of your clients were, because based on experience—bad experience, I believe. Did you say that? Based on—

MR. WATTS: I said based on experience.

MR. KENNEY: Based on experience. You're speaking specifically in Richmond?

MR. WATTS: No, sir. I'm speaking generally. That is, any time you restrict access to the bidding process and reduce the number of bidders who are able to make a bid, in my view and in the view of my clients, the simple laws of supply and demand will necessarily raise the price of the project.

MAYOR WEST: Are there further questions?

MR. LEIDINGER: Yes, sir, I had a question, Mr. Mayor.

MAYOR WEST: Mr. Leidinger.

MR. LEIDINGER: Mr. Mayor, Members of Council. Mr. Gillespie, I think the answer to your question is pretty simple. At least as I see it. Mr. Hefty's put his name on the [28] paper and said it's legal, period.

MR. GILLESPIE: Mr. Leidinger, Mr. Hefty also said that he would not guarantee a victory in Court.

MR. HEFTY: Mr. Gillespie, I said I could not guarantee a victory in Court in just about any case.

MR. LEIDINGER: Excuse me, Mr. Mayor. I thought I had the floor.

MAYOR WEST: All right, Mr. Leidinger.

MR. LEIDINGER: Mr. Hefty's put his name on this paper and he said it's legal. The person at the podium, Mr. Watts, has indicated that in his opinion, he doesn't think it is legal. I would suspect that AGC here in Richmond and here in Virginia, and I would just offer this as a speculative thought, would probably seek a declaratory judgment, seek an injunction, what have you, if this ordinance were adopted tonight.

MR. RICHARDSON: Only if you encourage them. Only if you're going to encourage them tonight. If you want to make that suggestion, you can take the floor and go ahead and ask them to.

MAYOR WEST: Mr. Leidinger, finish your comment, please.

MR. LEIDINGER: Thank you sir. I suspect that there may be a declaratory judgment sought, there may be an injunction sought by AGC, as AGC has done in other instances, [29] so it wouldn't be that novel or that new, if you would. On the other hand, I suspect that the ordinance, if acted upon tonight, is probably going to get the same number of favorable votes as it would have gotten two weeks ago, or as it might get two weeks from now. For my part, I'm prepared to act on the paper tonight, and if there are differences in interpretation of the law and who is right legally, I suspect there are other forums for us to find that out, and we'll find it out fairly shortly, if actions are initiated.

MAYOR WEST: Mr. Richardson.

MR. RICHARDSON: I just had a question for Mr. Watts.

MR. WATTS: Yes, sir.

MR. RICHARDSON: Mr. Watts, you quoted phrases like common interest and high quality and impairing the contract process, and yet, this City is 50 percent black and 50 percent white, and you represent an organization admittedly with no black participation whatsoever. I'm not in a Court and I'm not going to challenge you here tonight, but my conscience would advise you to take a copy of this ordinance back to your organization.

MAYOR WEST: Are there further questions?

MS. WAKE: Mayor West. Mr. Richardson, I think your remarks are highly out of order.

MR. RICHARDSON: Out of order? How would you—

[30] MAYOR WEST: Mr. Richardson.

MS. WAKE: I think they're ridiculous. I think when you say 50 percent black and 50 percent white in this City, it doesn't mean that we've got 20 percent black and 20 percent white contractors, or 20 percent white and 20 percent doctors. So, you—to me, there's no relevancy to what you're saying, and I think that's unfair.

And I have a real problem with the paper, because I reject this notion that because you're asked to go back, as this lovely lady said, four or five times, that that's because she's a minority contractor. I had that same experience as a businessperson, and it wasn't because of my race. It's because that's the way the system works, and that's the way you have to work to get in. And finally, you do get in the door. But, you don't, when you become a retailer, you know, walk in and demand the respect that the head of Miller and Rhoads and Thalhimers do. And it's the same thing with anything else.

And this man has made a valid point. You've got to have—it's going to be more costly. It's going to be terrifically more costly. And the thing that bothers me in situations like this, when you try to improvise and mandate by law what you think is fair and which I would like to see, too—I would like to see minority participation. But, I've known cases where what do you do? You get some smart white man [31] that gets a black front and he's the one that's pulling it all in. So, I don't think that we ought to think that we're going to pass a paper like this and change the world, which you and I both would like to see. It just isn't done.

But, I do believe that when you get out there and you work hard, that whether you're black or white, you are going to get a part of the pie.

UNIDENTIFIED: Well, we want to thank you for that.

MAYOR WEST: Is there anyone else to speak in opposition to this paper? May I see the hands of those who will speak in opposition? All right. Four, five. All right. Come forward, please. So that we may save as much time as possible, will those of you who are going to speak further, come down and take a seat on the front row, please?

MR. BECK: Mayor West, City Council, my name is Richard Beck. I'm vice president of a local Richmond plumbing, heating, cooling contractor. I am speaking tonight in behalf of the Richmond Plumbing, Heating, Cooling Contractors. I am the president of that association. I am also speaking as a representative of the 150 member Virginia State Plumbing, Heating, Cooling Contractor Association.

Competitive bidding without restriction insures construction of public projects at the lowest possible cost. At a time when public interest demands official responsibility [32] and spending restraints, it is unreasonable to carry forward programs which gain less than the fullest value in the use of citizens' tax dollars. To the extent that any City program or ordinance impedes the competitive process, its construction costs will increase ever higher.

Based on the research of our national plumbing, heating, cooling contractors association, they have found that based on public and private testimony, excessive cost, brokering of business and creation of fraudulent firms have occurred under this type of ordinance. Also, they have found that minority firms involved in this type of program have been mostly unsuccessful later in competing competitively in the private sector.

We, as plumbing, heating, cooling contractors, are very concerned by this proposed ordinance, in that instead of a general contractor awarding plumbing, heating, cooling work to a low bidder, he must consider awarding to a minority contractor, who may not be the low bidder, in order to meet the requirements of this ordinance. Therefore, the general contractor could have a higher bid

price due to not using the low bidders on 30 percent of the work.

We also question whether this ordinance has been researched to ascertain if minority contractors are available and qualified to perform City work of the percentages and magnitude proposed in the ordinance. Under State law, it [33] is unlawful for any firm, person, corporation, to engage in or offer to engage in general contracting or subcontracting in this State on a job of $40,000 or more unless he has been duly licensed under provisions of Title 54, Chapter 7, of the Code of Virginia. This is a class A license contractor requirement. We question the availability of minority contractors to meet this requirement. In addition, are the minority contractors available in sufficient numbers to perform the amount of City work involved? We question if minority contractors are available even to five to ten percent of City construction work.

In conclusion, we feel the ordinance goes against the State law of competitive bidding, and the City practices of purchasing on competitive basis on public construction work. We strongly recommend that you, as City Council, vote against this proposed ordinance 83-69. Thank you.

MAYOR WEST: Next speaker, please.

MR. SINGER: Mr. Mayor and Distinguished Members of the Council, my name is Mark Singer. I'm representing this evening the Virginia Chapter of the National Electrical Contractors Association and the Richmond area Municipal Contractors Association, a combined group of nearly 200 contractors that perform work in the Richmond area and throughout other parts of the State. I learned a lot, Mr. Mayor, about grants early on in the evening. In that [34] respect, I'm going to try and be as brief as I can in addressing this issue.

I think what Council has seen here tonight is a very grave concern on the part of many of us in the private sector concerning the proposal you have before us. Essentially, what we have here is a force-feeding type of

approach, with an arbitrary number of 30 percent tacked on. My clients have a concern, and essentially that concern is three-fold.

We do not believe that if this ordinance were passed, the 30 percent rule could be met locally. We believe that the quality of construction would suffer as a result of mandating contractors to perform work on certain contracts, and we believe that as a result of this reduced competition, construction costs in the City of Richmond would go up.

What is the requirement now? Mr. Mayor, I have to tell you, quite frankly, and Members of the Council, I have been unable to determine if, in fact, there is a requirement now, although I did hear Mr. Todd make reference to somewhere between seven and ten percent. Is the City comfortable with the 30 percent requirement without a fair and objective showing that any previous lower rate of set-aside has worked, and worked productively? Are the City and local contractors going to be put in a position of having to scour the State and perhaps even look outside of the State to be able to comply with the [35] 30 percent set-aside requirement? I can tell you, gentlemen and ladies, from experience, that our contractors have already had to do that, and have had to have looked as far as Maryland in the past in an effort to comply with these types of provisions.

In the final analysis, what is it that Council is really trying to accomplish by the adoption of this ordinance? I think clearly, to successfully bring disadvantaged contractors into the mainstream of the construction industry in the Richmond area. We don't believe that this force-feeding approach is the way to accomplish that goal. In fact, we believe the opposite may take place.

Contractors overextending themselves are a major cause of bankruptcies in this country, and I can tell you that the subcontractors that I represent are suffering greatly from bankruptcies. Set-asides tend to posture contractors in such a way so as to bid jobs that perhaps they really may not be able to perform. It's an apple sitting out

there, Members of Council, and it's one there's a great temptation to pluck. There's an illusory means of increasing minority participation in the construction market place. If the minority contractor cannot perform, the other contractors on a job suffer, the City suffers, and as a result, so do its residents.

I'm almost through, Mr. Mayor. We believe it [36] would be in the best interest of the City for this Council to vote against any set-aside, particularly one of the 30 percent magnitude. There are other options that we think may work better, certainly some other ways to consider the problem.

I would only like to add one thing, Mr. Mayor, in concluding my information. I have represented construction groups for about ten years, and have lobbied in the General Assembly for an equal number of years on their behalf. It's my understanding in terms of State law, that State law expressly prohibits set-aside contracts for State construction. I must admit some vagary in terms of how the Dillon rule applies in the situation we're faced with tonight, but I am quite confident that the State law does prohibit the set-aside provision of public contracts. Thank you for your time.

MR. MARSH: Mr. Mayor?

MAYOR WEST: Mr. Marsh.

MR. MARSH: I have one question for Mr. Singer. Of the 200 contractors, chapters you represent, how many are black, minority owned?

MR. SINGER: Mr. Marsh, I do not have the information for the Municipal Contractors Association. I would certainly be happy to obtain that for you promptly. For the Electrical Contractors, I have more of a full-time position with them. We have two contractors—we have three minority contractors, two black contractors and we have one application [37] pending for a minority contractor.

MR. MARSH: Out of how many?

MR. SINGER: Out of 81.

MR. MARSH: And how many would you say are in the other group?

MR. SINGER: I really do not know, sir.

MR. MARSH: You have no idea, whatsoever?

MR. SINGER: No, sir.

MR. MARSH: Thank you.

MAYOR WEST: Are there any more questions? The next person to speak in opposition.

MR. MURPHY: Mayor West and Members of Council, my name is Patrick Murphy. I am representing the American Subcontractors Association. We are opposed to this bill because we don't think it would be workable. To give you a little statistics, since we seem to be quoting them tonight, the latest Bureau of Census survey of minority business enterprises under the construction heading found that there were 4.7 percent of all construction firms in America are minority owned. Forty-one percent of that 4.7 percent are located in five states: California, Illinois, New York, Florida and Hawaii. The remaining 59 percent of that 4.7, or 2.8 percent of all construction firms, are divided between the remaining 45 states.

Now, what this means to us is that we need a [38] subcontractor that is a minority contractor. There's not very many around. The problems our members and the AGC members will have are as follows. First off, we have a problem of finding one or two to bid a project, to bid specific areas of work. We have trouble finding firms that are qualified and experienced to do the work. We have trouble finding firms that are financially capable of supporting the cash flow on major projects. We have trouble finding firms that are bondable. We have trouble finding firms that have the proper insurance requirements that can meet the project requirements.

We have had trouble in the past finding unreasonable pricing arrangements when they had set-asides, and I would like to give you an example of one case that I am personally involved with. A company set aside to meet their requirement approximately $195,000 worth of work on a waste water plant. Five minority firms were invited

to bid. Three never replied. One wanted to work only on a cost basis because he wasn't sure he could estimate correctly that volume of work. The one who did turn in a price for this $195,000 worth of work was $490,000, and was from out of State.

One problem we also have is that if we do go with this set-aside on any type of work for the City, we think it should be a City firm, or at least a State firm. In many cases, to find a qualified minority firm to do large projects or parts of large projects, we would have to go outside of the [39] State. We think that in the City, we should try to keep City work at least in Virginia. We feel that 30 percent is a very unreasonable amount to try to obtain. Does this bill—which we don't have a copy of —one other thing we have a problem with is, we don't know what we would do if we couldn't find a person or firm that was capable of bidding the work. Does that mean if we couldn't find 30 percent, we wouldn't be able to bid the work? That's all I have. And I know Mr. Marsh is going to ask me a question about how many of our members are minority.

MR. MARSH: Correct.

MR. MURPHY: But, I will tell you this—

MR. MARSH: No. Answer the question first.

MR. MURPHY: I don't know, Statewide. In the Richmond Chapter, I know of none. But, I can tell you how many have been turned down, none. Because, since I've been chairman of the membership committee, I have had none ask to become members.

MR. MARSH: How many members do you have?

MR. MURPHY: In Richmond?

MR. MARSH: Yes.

MR. MURPHY: Eighty.

MR. MARSH: And how many do you have Statewide?

MR. MURPHY: I'm not sure, Statewide.

MR. MARSH: I mean, about how many people?

[40] MR. MURPHY: I would say probably 150 to 200.

MR. MARSH: And you don't know of any minority?

MR. MURPHY: I don't know anybody in the other chapters, only the Richmond chapters. But, there have been none turned down.

MAYOR WEST: I gather from your presentation that you are not conversive with all of the provisions. Mr. Richardson or the clerk may want to provide you with a copy, because some of the questions that you asked are addressed in the paper, itself, and you need to get a copy of that paper.

MR. KENNEY: Mr. Mayor?

MAYOR WEST: Mr. Kenney.

MR. KENNEY: You indicated in your presentation of—as you perceive this particular ordinance would create problems insofar as bidders and what have you. In involving an employment civil rights act and so forth. I have heard that same argument in the past that minorities couldn't qualify for jobs, they couldn't qualify for certain higher educational institutions, they couldn't qualify for promotions. So, what you're saying is the same thing I heard during the '60's, that minorities, you just can't find qualified people. So, I think this is consistent with most individuals who are opposed to affirmative action, equal employment opportunities and what have you, and I appreciate—

[41] MR. MURPHY: I would not agree with you on that. The biggest problems we've had are the bonding and the financial capabilities, not the fact that we didn't want to use them. Thank you.

MAYOR WEST: The next person to speak in opposition, please.

MR. SHUMAN: Mr. Mayor, Members of Council, I am here—I'm Al Shuman. I am here on behalf of the Central Virginia Electrical Contractors Association, and also a new organization just formed in the City for the Richmond area. It's a Richmond chapter, actually. Professional Contractors Estimators Association. I can stand up here for the next 15, 20 minutes and repeat everything you've just heard. We're going to get nowhere

fast. I sat here tonight from 7 o'clock this evening until now, 11:25, and listened to everything that you people had to go through. I admire you.

But, now that I stand here, Mr. Marsh, you asked a question before, how many members are black that belong to all these organizations. The company I work for belonged to all these organizations. Nobody that I know of, black, Puerto Rican or any minority, has ever been turned down. They're actually sought after to join, to become part of us. Maybe we can help them and, therefore, help ourselves.

I am a minority, not recognized by the United States, I guess, because I'm Israeli. I feel I'm a minority [42] in many cases, but I also have the ability and aggressiveness to make something of myself, and I honestly speak for the two organizations that I sit here and I'm shaking a little bit because I heard you say, well, how many are black that belong. Well, quite frankly, I, myself, am on the membership committee of the Estimators Association. I went out and we got participation. How did we get it? Why don't you help us get members. We're looking for it. We ask for it. We want them to join us. The economic membership fees are not great. They're very reasonable. But, they don't come out. Are you trying to push them into something that they're not capable of doing? I don't think so. Do you want them to benefit themselves? Yes, you do.

Let's address some of the things you talked about tonight. You need money for additional well-worth causes. You're concerned, our City Manager's concerned, that the bidding process might cause some of these projects to go over the case by limiting the amount of bidding that's going to be done by certain companies because they can't get minorities to join them. Whether they're available—if they are, I'd like to see that list of minority firms that are available in the City. Especially, to help us out when we bid. If they're not available and the bidding price goes up, would that not limit the amount of programs

you will be able to do this forthcoming year. I think it will.

[43] Bidding one hundred percent open to the public means one hundred percent participation if they want to. Bids are opened publicly. They're available for anyone. In most cases, you can require naming the subcontractors or the low bidders going in under the general, if that's important to you. But, the most important thing to me, and I think to the public, is to have the most economical projects built today at the lowest possible cost, so it will enable you and your peers and my peers and your constituents to get as many projects under their belt and built in this fiscal year and in the fiscal years to come.

We open our arms and invite you and your friends and your knowledgeable constituents that are in this contracting firm to join our organizations. Make applications. We are in no way, shape or form standing here today, or ever will in the future, or have in the past, prohibited a minority from joining our organization.

I am just summing up. We have to, for the betterment of the public in general, ask you to defeat this motion on the floor tonight and to find some other way, so we don't hurt the total community by having projects go over budget. By not being able to do all you want to do for the public. This is not the answer. There must be another way. I will answer any questions you have.

MR. MARSH: Mr. Mayor?

[44] MAYOR WEST: Mr. Marsh.

MR. MARSH: Mr. Shuman, I appreciate your statement, and we're going to help you in your effort to get some black members. But, I still have to ask you the questions. In the Central Virginia chapter, about how many members are there, would you say?

MR. SHUMAN: In the—

MR. MARSH: Altogether.

MR. SHUMAN: In the Professional Estimators Association, here in the Richmond chapter, there is now 60 members. One is black.

MR. MARSH: One of out of sixteen?

MR. SHUMAN: One out of sixty.

MR. MARSH: Sixty. Okay. In the Central Virginia chapter, what's the total number of members?

MR. SHUMAN: I believe there's 45, and at this point, I don't know how many—I believe there's one minority.

MR. MARSH: Thank you, sir.

MR. SHUMAN: Mr. Marsh, may I ask you a question? How many black electrical firms are there in this City?

MR. MARSH: There will be more in the future than there are now.

MR. SHUMAN: We hope so, because we'd like to have them.

[45] MR. KENNEY: Mr. Mayor?

MR. MARSH: Mr. Kenney.

MR. KENNEY: Gentleman—I can't recall your name—do you reside within the boundaries of the City of Richmond?

MR. SHUMAN: I live in Henrico County right now. I'm moving back.

MAYOR WEST: Thank you so much. I know we have hashed this over quite a bit. We talked about the legality of the paper. But, I guess the thing that concerns me more than anything else that I've heard here tonight is insinuations that minority contractors inflate the bidding process, that their performances would be conducive to not first-class work. And I don't think that this paper is designed to perpetuate that kind of deficiency. I'm just speaking as one person.

I am more disturbed by that kind of attitude than I am about the legality of this paper. Sure, I want it legal. I want it morally right. But, I would say the attitudes of persons who have to participate in this process also have to be morally right. And, I've heard sprinkled throughout several presentations the idea that minority participation would result in inflation. It may, but that's not a unique situation. That minority participation would result possibly in work not being first class,

that's not unique to minorities. And I would say to all persons concerned [46] that maybe that's the purpose for this paper. That we have not had the kind of attitude in the market place that was needed.

Clerk, call for the question, please.

MR. MARSH: Just, there are some remarks I would like to make, Mr. Mayor, if you don't mind. I think all the reasons that we have heard tonight urging the defeat of this particular paper have been considered before and rejected by Courts, and I think those arguments are without merit. There is some information, however, that I want to make sure we put in the record. I have been practicing law in this community since 1961, and I am familiar with the practices in the construction industry in this area, in the State, and around the nation. And I can say without equivocation, that the general conduct in the construction industry in this area, and the State and around the nation, is one in which race discrimination and exclusion on the basis of race is widespread.

I think the situation involved in the City of Richmond is the same, and I would like to give the Clerk a copy of the listings of the contracts for the past five years awarded by the City of Richmond. Contracts totalling over 124 million dollars. And less than one percent were given—were awarded to minorities. I think the question of whether or not remedial action is required is not open to question.

I think this is a good paper. There's enough [47] flexibility to permit the paper to work, and I can appreciate all of the arguments made by those who have opposed this paper. But, I can say that they were made in other places and other times whenever papers like this have been proposed. They were made when the City adopted the requirement for the CDBG—the requirements, and our experience has shown in that area that our percentage has exceeded the numbers specified and the problems anticipated had not been realized. The disease is not as bad as the anticipation and the dread. And, I would

say that this paper is going to work. It is legal. Let's give it a chance.

MR. DEESE: Mr. Mayor?

MAYOR WEST: All right, Mr. Deese.

MR. DEESE: Mr. Mayor, Members of the City Council, I would concur with Mr. Marsh's statement in it's entirety. I spent my early years in government working for the City of Pittsburg, my home town, working for the Mayor's Office and the Human Relations Commission. And, racial discrimination in the area of contracting has not changed that terribly much since those days in the mid '60's. And I would dare say, Mr. Mayor, Members of Council, that the opportunities for minority contractors have not improved that greatly in the 18 years since I left the City of Pittsburg. And I would dare say that an improvement can be made here in this particular area.

[48] MAYOR WEST: Any further discussion?

MR. KEMP: Mr. Mayor?

MAYOR WEST: Mr. Kemp.

MR. KEMP: I didn't hear the same message from many of the speakers tonight that apparently came across in the minds of some of the other Members of Council. I felt that every presentation was fair, was aboveboard. It spoke to the point. It indicated that the minority contractors were just not available. There wasn't a one that gave any indication that a minority contractor would not have an opportunity, if he were available. I just—I hate to see this Body criticized—those people who came here in good faith tonight, to express hope that minority contractors would be available. Any time you put a limit or a mandate, it seems to me that all you're doing is exacerbating a bad situation. I would love to see more minority contractors here. But, those types of things just take time.

I think the legal points that were brought up, we've got all of the litigation that this Council can stomach, and I would hate to see us open a door to further litiga-

tion on a matter that has been expressed that they would love to have them. If this paper's voted on tonight, I'm going to have to vote in opposition to it.

MR. RICHARDSON: Mr. Mayor?

MAYOR WEST: Mr. Richardson.

[49] MR. RICHARDSON: Mr. Mayor, Members of Council, and to those individuals who came down to speak to this paper, I had hopes that the paper, itself, would not have evoked such conflict and disagreement on where we all want to go. It seems like everybody is so in love with each other and so hopeful and wanting everything to work together and want everybody to be a part of everything, idealistically. But, when it gets down to a practical matter of making it happen, there tends to be a lot of excuses.

Mr. Kemp, when you say these things take time, they can take as much time as we permit it to take. We can either let it happen over the next 200 years, or we can contribute to making it happen over the next two years, or three, or four.

I think the same types of things we heard tonight, particularly when we consider that list that was handed to Mr. Duffey on the contracts over the last five years, after talking with the City Attorney and discussing this matter, we found that .67 percent went to minorities. After realizing that and after realizing that many of the speakers who stood had an even lesser average of black participation, I am more convinced now than ever before that we need to contribute together in a good faith effort to make this happen, not let it happen over a long period of time. Because, some of the same things that were said tonight, in 1983, were [50] said in 1933, about police officers who would be black, about firemen who would be black, about teachers who would be black, about the system crumbling because all of a sudden, someone who was perceived as being lesser of a human being, will be put in a position of responsibility. And unless we're able—all of us, black and white—to be courageous enough to take that step and say we're going to make this happen,

then it won't happen. But, as long as we come up with these excuses that they're not out there, then they won't be out there. As long as we set back and say we can't do it, then we won't do it.

So, I think the Council ought to, all of us, ought to vote affirmatively, to get the ball rolling for all of our benefit. Not just a part of us, all of us. And I think it will work.

MAYOR WEST: Mr. Gillespie.

MR. GILLESPIE: Yes. I have a question for Mr. Deese. I wish we were in a work session, I think it would be more appropriate there, but this is the only chance I've got to ask it. I assume, because we have policies that are on the books now and because it is something this City wants to do—

MR. MARSH: Sorry to interrupt, but, Mr. Gillespie, your voice is tailoring down. I can't hear you, and I don't want to miss this.

MR. GILLESPIE: Pay strict attention. I know [51] that you will.

Apparently, you have not been able to find, at least locally or nearly locally, 30 percent contractors, minority. My question is, since, therefore, the contracts must be going to nonminority contractors, who are employing both blacks and whites, these people will now not be getting some 23 percent, 22 percent, whatever the number is, of the contracts that the City lets. So, therefore, my question is, have you assessed the impact that this is going to have on unemployment in our City, and particularly on unemployment among blacks, which is one of our most significant problems. My concern being, that if we have to go to great lengths and long distances to attract minority vendors, what's that going to do to our unemployment picture in the City of Richmond?

MR. DEESE: Mr. Gillespie, the law, as I understand it, reads specifically that if a contractor makes a good effort to attempt to find minorities and he is unsuccessful in that attempt, then he or she can apply for the—

he can apply for the appropriate waivers, and those waivers, if granted by the department, working its way eventually up to me, and if I concur in it, the contractor is waived from that responsibility. So, he has to make an effort to obtain minority contractors. If he is unable to do that and he has made the necessary efforts, contacting the necessary groups and organizations, then the matter is waived. And, we [52] do that frequently.

MR. GILLESPIE: So what's the impact, then, on unemployment in our City going to be?

MR. DEESE: I can't assess that. I don't have—

MR. GILLESPIE: Is there going to be an impact?

MR. DEESE: I don't know. The only thing that I can say is, there are firms that hire minorities as laborers or in some capacity, and they continue to do business in the area. I would assume that they will continue to hire minorities in some of the laboring positions they have in their organizations.

MR. GILLESPIE: Since you don't know, and since it is a problem in our City, is it worth assessing the impact before we act on the bill?

MR. DEESE: I don't think that's necessary.

MR. GILLESPIE: Okay.

MR. DEESE: My opinion.

MR. GILLESPIE: Mr. Mayor, I expressed my reservation about the legalities, privately and publicly. Several Members of the Council have said, you know, let it go, let's go to Court. Let's decide the question.

I'm tired of going to Court. And as much as I support this, you-all have put me in a position where you're going to make me vote no on something that I'm very much in support of. I was very much behind the Mayor's minority [53] business enterprise board. I want to support those people, all they do. I may want to support this bill if I can be comfortable, legally, with it. But, I am not now. And that's all I have to say.

MR. MARSH: Mr. Mayor?

MAYOR WEST: Mr. Marsh.

MR. MARSH: I just want to say, without naming anybody, that I hope when we vote on this bill, we are man enough, or woman enough, to vote on it and not try to find excuses as a reason why we're not going to vote for it. We ought to be big enough to stand up for our vote and not try to find excuses on a matter of this importance to the community.

MR. GILLESPIE: Mr. Marsh, I'm not looking for excuses—

(Inaudible discussion.)

MR. MARSH: Do I have the floor?

MAYOR WEST: Yes, Mr. Marsh, but I think you may be impugning another Councilmember's integrity—

MR. MARSH: I am not.

MAYOR WEST: —and I would rule you out of order.

MR. MARSH: I would like to complete my statement.

[54] MAYOR WEST: I would have to rule you out of order if you want to impugn someone's integrity.

MR. MARSH: I'm not impugning anyone's integrity.

MAYOR WEST: It is the Chair's position that if you continue with this line of statement, you are impugning, and you are out of order.

MR. MARSH: I would like to complete my statement, Mr. Mayor.

MAYOR WEST: All right.

MR. MARSH: I think this is an important policy matter for the City. And all of us are entitled to have our various reasons for taking the position that we take. And I think those of us should be willing to state those reasons, and I'm willing to state my reasons for supporting the paper. And I hope that anybody who would oppose the paper, would give his reasons, his real reasons, for opposing it.

MS. WAKE: Mr. Mayor?

MAYOR WEST: Ms. Wake.

MS. WAKE: Mr. Marsh, I assure you that as always, I'm going to give my real reasons. I oppose this

paper because it just strikes to me at the core of what this Country is all about.

Mr. Richardson, you don't make it happen. You get out there and you work your butt off, and it does happen. That's what this Country is all about.

[55] And I want to remind you that when you pass legislation like this, we could down the road experience something like what Miami is going through right now. And all of a sudden, they would be appearing down here, and your black contractors would be saying yes, but how about me? How about me? When they start saying, you've got to cut us in. That is an unofficial way of manipulating the free-enterprise system. And, it doesn't work. And, it isn't going to work.

Now, I think with the accusations that have been made here tonight and the questions that have repeatedly been asked of every speaker that we've had, that it would behoove you co-sponsors of this bill to have brought in—and I still want it brought in at some later date—a list of minority bonded—now, I'm talking about responsible minority contractors in this City. Because I know, myself, from experience—I inquired one time about a minority person that I thought wasn't getting any business in the City, and you-all said no way do you want us dealing with them.

So, you just make your choice among minority contractors. And you have acknowledged to me first hand that you recognize there was some responsible and some not responsible. But, I think if there are this great number out there, I want to see a list of them. Because I think then these gentlemen out here should have a copy, and they will know where to seek their membership.

[56] But, to just impugn them and say, you're exclusive, when I am a part of an organization that has been in a similar situation, and we are having the same problem. And to accuse people of being racially motivated

when they do not have black members I think is most unfair.

MR. KENNEY: Mr. Mayor?

MAYOR WEST: Mr. Kenney.

MR. KENNEY: When decisions are to be made in forums such as this, in which many individuals will make allegations which we've heard over the years, that minorities have some inferiors—and the inference has been made here this evening. Again, I want to remind all Members of the Council, and to the public in general, that we, as minorities, heard this in the '60's, we heard it in the '70's, and in 1983, we're hearing it still. And when the votes are taken on these kinds of issues, you really show your true colors.

MR. RICHARDSON: Mr. Mayor?

MAYOR WEST: Mr. Richardson.

MR. RICHARDSON: Trying to at least wrap this thing up on a high note, at least something positive to think about, certainly I'm sorry to see that we've turned it into something that appears to be so ugly, because I think Richmond has better than this. And I just want to tell the public that it's not really this bad. It's really not this bad. It's going to be much better. Because number one, I want you, [57] Mr. Deese, with Mr. Carter's assistance, to provide Ms. Wake with that State computerized list of bonded, qualified, quote, unquote, responsible businesses. And two, I want to remind you that the same thing was said in Atlanta when they built the largest airport in the world, and minority contractors finished it on time, in budget, and nobody is complaining now.

So, if you want to exercise that self-fulfilling prophesy of failure, then that's probably what would happen. But, if you want to look at it and say, we can do it, then that's what we will do. And I hope we approach it from that vantage point and not from a defeatest vantage point, for some unstated reason.

MS. WAKE: Mayor West?

MAYOR WEST: Ms. Wake.

MS. WAKE: I want to respond that you and Mr. Kenney, etc., have used the word inferior. I have not heard that word.

MR. RICHARDSON: I didn't say that.

MS. WAKE: You did. You just used it, because I wrote it right down when you used it. And you said inferior. What I hear is numbers. You did so. You come listen to the recording tomorrow. You said inferior, that we're saying inferior. And it is numbers that I'm hearing. It's not the inferior fact. It's the fact of where do we find the people to bid, because of the lack of numbers of these craftsmen. [58] And that's the point they are speaking to. And you're the one that brings in the other, that hasn't been mentioned.

MAYOR WEST: Call for the question, please.

MR. DUFFEY: Mr. Gillespie?

MR. GILLESPIE: I abstain.

MR. DUFFEY: Mr. Kemp?

MR. KEMP: No.

MR. DUFFEY: Mr. Kenney?

MR. KENNEY: Aye.

MR. DUFFEY: Mr. Leidinger?

MR. LEIDINGER: Aye.

MR. DUFFEY: Ms. McDaniel?

MS. McDANIEL: Aye.

MR. DUFFEY: Mr. Marsh?

MR. MARSH: Aye.

MR. DUFFEY: Mr. Richardson?

MR. RICHARDSON: Aye.

MR. DUFFEY: Ms. Wake?

MS. WAKE: No.

MR. DUFFEY: Mr. Mayor?

MAYOR WEST: Aye.

MR. DUFFEY: Aye's, 6; no's, 2; and one abstention.

(The hearing was concluded.)

[59] I, Marion L. Gerheart, do hereby certify that the foregoing is a true and accurate transcription of my shorthand notes taken from the electronically-produced proceedings.

Given under my hand this 30th day of January, 1984.

/s/ Marion L. Gerheart
MARION L. GERHEART
Notary Public
Commonwealth of Virginia at large